373 U.S. 378

(20)

No. 941

FILED

APR 12 1941

CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

THE CONTINENTAL CASUALTY COMPANY,
Petitioner,

against

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR REVIEW ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

ROBERT M. McCORMICK,
ANDREW ECKER,
Counsel for Petitioner.

INDEX

Petition

	PAGES
1. Statement of Matter Involved	1-11
Facts and Nature of Case	1-2
Opinions Below	3
Analysis of Statute and Bond and Contentions of Petitioner	4-8
Analysis of Circuit Court Opinion	9-10
2. Jurisdiction	11
3. Questions Presented	11
4. Reasons Relied On for Allowance of Writ	12

Appendix

World War Adjusted Compensation Act, 38 U. S. C. 620-649	19-21
Opinion of Circuit Court in United States v. Hartford Accident & Indemnity Company, 117 Fed. (2d) 503	22-26

Table of Cases Cited

Decisions of Comptroller General, Vol. 14, pp. 770-772	11, 13
Rorick v. Devon Syndicate, 307 U. S. 299	12
United States v. Hartford Accident & Indemnity Company, 117 Fed. (2d) 503	3
United States v. National City Bank, 28 Fed. Sup. 144	6
United States v. Williams, 278 U. S. 255	14

Statutes Cited

Judicial Code, Sec. 240(a)	11
World War Adjusted Compensation Act, 38 U. S. C. 620-649	1, 2, 4, 5, 6, 7, 8, 9, 10, 11, 12, 14, 15, 16

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

THE CONTINENTAL CASUALTY COMPANY,
Petitioner,

against

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR REVIEW ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, The Continental Casualty Company, respectfully prays that a writ of certiorari issue to review the decision of the United States Circuit Court of Appeals for the Second Circuit, rendered in the above action, reversing a judgment in favor of petitioner and directing judgment in favor of respondent.

Statement of the Matter Involved

This is test case involving the construction of several provisions of the Act of Congress commonly known as the World War Adjusted Compensation Act (38 U. S. C. 620-649 (Appendix, infra, pp. 19-21) and the standard form of bond promulgated thereunder by the Veterans' Administration (R. 39). That Act, in substance, provides for the

issuance of "adjusted service certificates" to the veterans of the World War which take the form of an unconditional obligation of the Government to pay a stated sum on July 1, 1945, or upon the death of the veteran prior to that date (R. 15). The veteran was granted an unrestricted right to borrow from any bank or trust company, upon his promissory note secured by his certificate, an amount not in excess of the specified loan value which increased yearly (R. 16, 21). The Act was subsequently amended to authorize duplicate certificates upon the loss or destruction of the original, provided the veteran post a bond "to indemnify and save harmless the United States from any claim upon such lost or destroyed certificate" (38 U. S. C. 649, infra, pp. 20, 21). By still later amendment the Veterans' Bureau was authorized to make loans also (38 U. S. C. 642 (i), infra, p. 20).

A standard form of bond was promulgated by the Veterans' Bureau which adheres strictly to the mandate of the statute and follows the familiar form of lost instruments bond in common use throughout the surety world (R. 3).

The veteran here involved, Marion Schley Davis, applied for a duplicate certificate and submitted the evidence of loss required by the Act on September 9, 1928, and received the duplicate April 3, 1929, upon posting the standard form of bond upon which petitioner became surety. He died November 11, 1930. The Government redeemed the duplicate and paid the proceeds to his wife. Subsequently, in March, 1931, the Philadelphia office of the Veterans' Bureau purported to make a loan of $516.22 upon the original certificate to an unknown person despite notice of the veteran's death and the redemption of the duplicate certificate (R. 49-50).

This action was brought in the Southern District of New York to recover the amount of said loan with accrued interest to date (R. 5). After joinder of issue the Government moved for judgment. Petitioner made a similar cross-motion. The District Court granted defendant's mo-

tion and dismissed the complaint on the merits (R. 61). The Circuit Court reversed and directed judgment for the United States (R. 65).

An opinion was written in the District Court (R. 55-59), reported in 33 Fed. Sup. 65. The opinion of the Circuit Court (R. 65), reported in 117 Fed. (2d) 506, holds this case to be controlled by *United States* v. *Hartford Accident & Indemnity Company* (117 Fed. [2d] 503). That case originated in the Connecticut District upon different facts, but upon the same form of bond. It was decided concurrently with this case and the opinion therein rendered is appended hereto (infra, pp. 22-26). The references to the opinion of the Circuit Court herein will therefore be to that opinion.

In holding this bond to cover the loss in suit, the Circuit Court construed several sections of the underlying statute in a manner believed to be contrary to the clearly expressed intent of Congress, and the bond contrary to the intent of its author and the parties to it, and contrary to the long-established administrative practice obtaining in the Veterans' Bureau and General Accounting Office.

Concisely stated, petitioner contends that when the Act was amended to authorize duplicate certificates, the actual exposure of the Government was its legal liability upon the original certificates to authorized banks making valid loans upon the pledge thereof. It was also confronted with the necessity of resisting all invalid claims and required indemnification against the cost and expense of defending them. The standard form of bond prepared and used neither exceeds nor falls short of protection against those exposures for the following reasons.

The original Act of May 19, 1924 (R. 16) authorized certain banks to make loans upon the pledge of the certificate and expressly prohibited all other negotiation, assignment or pledge whatsoever. Violations were later made punishable by fine and imprisonment (Sec. 643, infra, p. 20). It made no provision for issuing duplicate certificates. At the time duplicates were authorized (Act of July

3, 1926, Sec. 649—infra, pp. 20, 21) the Government was not yet authorized to make loans to the veterans. That power was granted by the Act of March 3, 1927 (Sec. 642 (i) and (j)—infra, p. 20). Consequently, only banks had the right to acquire an interest in or lien upon the veteran's original certificate. The loss in suit could not have occurred when duplicates were first authorized and no such exposure existed.

The certificate takes the form of an absolute promise to pay a sum certain on a fixed date—July 1, 1945, or the earlier death of the veteran (R. 15), and incorporates verbatim Section 502 (38 U. S. C. 642) of the Act authorizing bank loans which has never been changed or amended (R. 16-21).

By Section 642 (b) (R. 16-18), banks are specifically "authorized * * * to loan to any veteran upon his promissory note secured by his adjusted service certificate (with or without the consent of the beneficiary) any amount not in excess of the loan" value. It specifically authorizes further negotiation among other banks. "Any bank holding a note for a loan under this section secured by a certificate * * * may sell the note to or discount or rediscount it with, any bank authorized to make a loan to a veteran under this section and transfer the certificate to such bank. * * * Any such note secured by a certificate and held by a bank shall be eligible for discount or rediscount by the Federal Reserve Bank, * * * whether or not the bank offering the note for discount or rediscount is a member of the Federal Reserve System and whether or not it acquired the note in the first instance from the veteran or acquired it by transfer upon the endorsement of any other bank. * * * In case the note is sold, discounted or rediscounted the bank making the transfer shall promptly notify the veteran by mail at his last known post office address."

Concerning the legal status of a lending bank, the Act apparently makes no provision for calling the loans or enforcing payment except out of the proceeds of the cer-

tificate upon maturity, but paragraphs (e) and (f) respectively of Section 642 (R. 19) expressly declare that "If the veteran dies before the maturity of the loan" or upon "the maturity of the certificate", the bank shall present the certificate and note to the administrator "who shall thereupon cancel the note (but not the certificate) and pay to the bank in full" the unpaid principal and interest and shall pay the balance of the proceeds of the certificate to the veteran or beneficiary. There is nothing discretionary about the right of the bank to collect its loan out of the proceeds of the certificate when the veteran dies or the certificate matures. The mandate of the statute is that the director shall pay the bank in full.

When it is recalled that these certificates were numbered in the millions and issued to ex-soldiers of varying degrees of financial responsibility containing a right to borrow money thereon, this Court perhaps can take judicial notice of the fact that the veterans immediately took full advantage of the right to borrow. The banks in turn were invited to make loans on the security of the certificates, which were uncallable, but payable absolutely out of the proceeds upon maturity. It is respectfully submitted that any construction of this statute relegating these banks to the status of a limited assignee of an non-negotiable instrument, and making it discretionary with the Government whether to pay these loans upon maturity, misapprehends the factual situation and misconceives the true purpose and intent of Section 642 of the Act. Moreover, banks obviously could not lend out depositors' money on the strength of any such security.

Concerning legislative intent, the question, of course, was the rights of third parties. The problem confronting Congress in amending the Act to authorize duplicates and the safeguard sought, was protection against the statutory mandate requiring the Government to pay loans upon the maturity of the certificates. As to all loans made, that liability appears to have been absolute. As to loans made subsequent to the issuance of the duplicate liability would

reside concerning such as were actually made to the real veteran in good faith and without notice of the issuance of a duplicate. No statutory change was ever made in the lending power of banks or their status.

In addition to the actual liability for valid bank claims against the proceeds of the certificate there was, of course, an exposure to invalid claims limited only by the ingenuity of criminals. Every loan made on an original certificate with notice, or to anyone except the real veteran would be contestable. While the Government was not then authorized to make loans, the loan in suit to the imposter could have been made by a bank. Such loan would have been contestable for the reason that it was made after maturity and not to the veteran and lawful owner. Other reported cases show misdelivery by mail of the original certificate and loans made to the recipient non-veteran having no title whatever (*United States* v. *National City Bank,* 28 Fed. Sup. 144). All such cases would involve questions of fact and be contestable claims falling to the attention of the surety.

Therefore the statute authorizing duplicates (Sec. 649, infra, pp. 20, 21) first requires the administrator to take "evidence clear and satisfactory to him that (the original) has been lost or destroyed". It provides a waiting period for investigation and a withholding of the duplicate for security. The duplicate shall be issued "with such restrictions as to time and retention for security or otherwise as he may prescribe". The emphasis is all on making sure that the original has been actually lost or destroyed as claimed before the duplicate is issued. In this case the affidavit and evidence was taken on September 9, 1926, but the duplicate certificate was "mailed to him on April 3, 1928" (R. 49).

The statute then exacts a bond with condition to indemnify and save harmless the United States "from any claim upon such lost or destroyed certificate". This quite clearly evinces a legislative intent to be concerned only with the rights of third parties. It is analogous to, if indeed

not actually parallel with, the risks entailed and liability confronted by the maker of a negotiable instrument when executing a duplicate. As so construed Section 649 coincides with the factual situation and the actual exposure the Government was confronted with when duplicates were authorized.

When the standard form of bond promulgated by the Veterans' Bureau is read against the foregoing background and setting, it is apparent that it adheres strictly to but does not exceed the statute (R. 40).

> "Now, therefore, the condition of this obligation is such, that if the above bounden obligors * * * shall *pay* or cause to be paid to the United States any and all sums whatever which the United States may be called upon to pay, including interest and costs, on account of the establishment of any valid adverse *claim* to the proceeds of the above described adjusted service certificate, or any part thereof, and shall well and truly *indemnify* and save harmless the United States from any *claim* on account of said adjusted service certificate and from all damage, loss, cost, charges and expenses which the United States may sustain, incur, or *be liable for* in consequence of any such *claim* or of the granting of relief on account of said Adjusted Service Certificate, with interest from the date of such payment, and any and all costs and expenses incurred in connection therewith, then this obligation to be void; otherwise to be and remain in full force and effect." (Italics ours.)

The word "claim" as used throughout undoubtedly means claims made against the Government to the proceeds upon the original certificate. The proceeds of the certificate is the only source from which, or fund out of which claims can be paid because nothing is payable until maturity. Moreover, all established claims must be valid and adverse. Consequently, the primary insuring clause covers all valid claims the Government can be called upon to pay. Those the surety must "pay".

The language then changes to an indemnity agreement and covers all contested claims whether they be valid or

not. If they are successfully resisted, the surety must "indemnify" the Government from all damage, loss, costs, charges and expense incurred in consequence of any such claim. If relief is granted—the claim established to be valid—the surety is liable for the amount of the relief granted with interest and all costs and the expenses incurred in defense of the claim. All contested claims are defended at the expense of the surety.

The statute contains much other evidence supporting petitioner's construction and defeating the suggestion that any and all losses of whatever character the Government might sustain by reason or in consequence of executing a duplicate are, or were intended to be, covered. The Act of March 3, 1927, added to Section 642 authority to make Government loans (infra, p. 20) and also amended Section 649 to dispense with a bond if the original certificate were lost before delivery to the veteran (infra, p. 21). It is significant that no change was made in the condition of the bond. Moreover, it would have been folly for Congress to dispense with a bond in *any* case if it is supposed to protect the Government against losses arising out of its own acts. The original text of Section 649 was later revised (Act of March 4, 1929) and a second exception dispensing with a bond also added, but again Congress failed to disturb or change the bond condition (infra, p. 21).

The Act of July 3, 1926, authorizing duplicates (Sec. 649) also amended Section 643 containing the restrictions upon negotiation by making violations punishable by fine and imprisonment (infra, p. 20), but did not disturb Section 642 concerning the rights of banks or in anywise curtail or terminate further negotiation by them. Having made so many additions and having consistently refrained from enlarging upon the restrictive language concerning the bond condition, the conclusion seems inescapable that Congress never intended to exact a bond protecting the Government against the newly created risks of loss through its own conduct in authorizing Government loans.

Petitioner therefore respectfully submits that when the language actually employed in the statute and bond is read in its natural setting and in the light of the surrounding facts, the bond should be construed as not covering the loss in suit.

Petitioner also respectfully submits that many statements made and reasons assigned in support of the construction placed upon the statute and bond by the Circuit Court misapprehend the facts and misconceive the underlying statute in the following respects:

If the statement at the head of the bond (R. 39) is to be deemed part thereof or as casting light upon its meaning, it will be noted that it describes the bond as security "against payment" (infra, p. 22). The first insuring clause employs just such language and says, the obligors "shall pay * * * all sums whatever which the United States may be called upon to pay" on account of any claim which the Government is obligated to pay.

The designation of a different beneficiary in the duplicate certificate (infra, p. 23) would be a change by and at the behest of the veteran in the exercise of his statutory right rather than by administrative decision. "The veteran shall name the beneficiary of the certificate and may from time to time, with the approval of the Director, change such beneficiary" (Sec. 641, infra, p. 19). The first named beneficiary evidently has no vested rights and the last one named would be the only one having a claim. The approval of the change by the administrator does not seem to be for the protection of the original beneficiary but in the nature of a safeguard to protect the veteran and to prevent violations of Section 643 which prohibits changing the beneficiary for the purpose of securing an unauthorized loan. Moreover, approval could not be arbitrarily or capriciously withheld, despite Section 620 (infra, p. 19).

Petitioner's theory or contention is that the bond covers all invalid as well as valid claims provided they are claims made by third parties against the Government and not claims made by the Government against the surety for

other losses, which contention dispels the difficulties of rationalizing the language of the bond alluded to by the Court below (infra, pp. 23, 24).

Banks are expressly excepted from the restrictions upon negotiability of the certificate. Petitioner submits that the spirit and evident purpose of the Act and the express language of Section 642 gives the bank a status tantamount to the holder of a negotiable instrument if indeed the certificate itself is not strictly a negotiable instrument. The discretionary power of the administrator to take over a loan from the bank under Section 642 (c) applies only before maturity. An administrative determination not to pay the loan upon maturity would be in direct violation of Section 642 (e) and (f) and be subject to review by the Courts and the defense of that suit would fall to the attention of the surety (infra, p. 24).

The conclusion that the bond covers losses sustained through the negligent acts of Government employees (infra, p. 25) is premised upon a construction that the bond covers all losses "upon the basis of, or having as its subject matter, the lost certificate". Under such construction the bond loses its identity as a lost instruments bond and there is read into it by implication, covering language not actually employed, whereas petitioner contends that the engagement of a surety is limited to the language actually employed. Petitioner further contends that the doctrine of negligence as applied to bonds posted with the Government requires the risk out of which the loss occurs to be definitely stated to be covered. If so, the fact that a loss actually covered is occasioned through negligence of a Government employee affords no defense to the surety.

The factual situation here presented again negatives the suggestion that the veteran and surety intended to assume such risk. The Government apparently set up no central office and devised no system compelling banks to report loans or to communicate with the Government before making them. A central office was maintained out of which all death claims were paid, but the Government field offices

making loans were not required to make inquiry of any central office, which accounts for a loan being made after the death of the veteran and payment of the certificate (R. 44, 45). In the face of such loose practice and conduct it seems evident that coverage against such an exposure to loss would have to be found clearly expressed in the language actually employed in the surety's engagement.

A further matter involved is the effect of a long established administrative practice construing this bond. Losses through loans to imposters were uniformly held by the Veterans' Administration and the Comptroller General not to fall within the coverage of this bond. Such a loss was reported to the Comptroller General "as an uncollectible indebtedness to the United States" for the reason that "the claim of an imposter is not a valid claim and that as a result thereof the obligation of the bond did not cover such payments". That interpretation of the bond was previously established by the "opinion of the Solicitor of the Administration" which opinion "was approved by the Administrator on Sept. 18, 1931" (see decisions of Comptroller General, Vol. 14, pp. 770-772).

Jurisdiction

The judgment of the Circuit Court of Appeals was entered February 27, 1941 (R. 66). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by Act of February 13, 1925.

The Questions Presented

The primary questions presented are the correct construction of the underlying statute (38 U. S. C. 620, 641, 642, 643, 649) and the standard form of bond promulgated thereunder by the Veterans' Administration, to the end that it may be determined whether the loss in suit falls within the coverage of the bond.

There is necessarily involved several specific questions which petitioner desires to bring forward but which are deemed to be incidental to the primary questions involved.

Rorick v. *Devon Syndicate,* 307 U. S. 299, 303.

To avoid repetition, they will appear among the questions of federal law which have not, but should be, settled by this Court, specified in paragraph 4 of the reasons relied upon for the allowance of the writ forming part of this petition, viz.: p. 15, lines 3-8; p. 16, lines 1-8; p. 17, lines 1-3, lines 19-21 and last par.

Reasons Relied On for Allowance of Writ

1. The amount immediately involved is $516.22, but the case involves a statute of great public interest and importance affecting many citizens. The veterans, of course, sign these bonds as principal and are primarily liable thereon. The number of citizens affected by the Act is self apparent. This original certificate bore the No. 2,773,061. The duplicate bears No. 3,334,075, although it was applied for as early as September 9, 1926 (R. 14). In amending the Act to authorize loans by the Veterans' Bureau in March, 1927 (Sec. 642 (i) (j), infra, p. 20), a fund of $25,000,000 was appropriated for that purpose in addition to the millions being loaned by banks. It is equally obvious that the entire banking and surety worlds are affected.

The questions involved were of such importance to the Government that the local United States Attorneys were evidently superseded because the record on appeal and brief in the Circuit Court were prepared in Washington and bore the signatures of the Assistant Attorney General and the Attorney for the Department of Justice, in addition to the local government attorneys. Petitioner verily believes, however, that the Government will not dispute the fact that this is a test case. A very substantial num-

ber of losses were undoubtedly sustained by the Government and have accumulated which will now be revived and pressed against the veterans and sureties inasmuch as no Statute of Limitations runs against the Government.

2. By long established administrative practice, the loss in suit was definitely held to be uncollectible. The solicitor of the Veterans' Administration rendered such an opinion which was approved by the administrator. The Comptroller General likewise so ruled (p. 11, supra). Hence, the author of the bond and all governmental departments concerned were in agreement and that practice obtained for many years. Subsequently, the Comptroller General rendered an opinion to the effect that while these losses as such were not covered by the bond, the bank cashing the Government check representing the proceeds of the loan became a *bona fide* purchaser with a valid claim against the Government upon the check and that the surety could be held liable upon that theory (decision of Comptroller General, Vol. 14, pp. 770-772) (R. 51). The complaint in this action was drawn upon that theory (R. 5, lines 8-12), which, of course, was patently fallacious and later abandoned. It was not until this motion was made in 1940 that the Government first made its present contention (R. 46, fol. 138).

In addition to the administrative practice, the District Court in both this and the companion case, rendered decisions adverse to the Government. The Circuit Court is the first to hold this case covered by the bond. In this situation it is respectfully submitted that the interests of justice will be best subserved by calling this decision up for review by this Court in order that one decision may be made binding upon all circuits, rather than testing the question throughout the various circuits until two conflicting decisions are rendered so as to permit an application to this Court upon that ground.

3. In view of the international situation and the expansion of the military establishment, it seems obvious that

many of the World War statutes such as here involved may be revived or renacted. A decision by this Court construing this Act and bond would be invaluable as information and guidance to the Congress should it conclude to adjust the compensation of the persons now being called into service in defense of the nation.

4. The Circuit Court of Appeals has decided important questions of federal law which have not been, but should be, settled by this Court, and has decided them in a way probably in conflict with the applicable decisions of this Court.

Section 620 of the Act concerning the conclusiveness of decisions made by the administrator appears to be the only section so far construed by this Court, although other sections appear to be of equal importance and far-reaching in effect.

In construing that section this Court said:

> "His decision is final, at least unless it be wholly without evidential support or wholly dependent upon a question of law or clearly arbitrary or capricious. Silberschein v. United States, 266 U. S. 221, 225, and cases there cited."
>
> *United States* v. *Williams*, 278 U. S. 255, 257.

(a) Section 641 gives the right to change the beneficiary to the veteran. The primary clause of the bond is accounted for as a safeguard against the possibility of a change by the administrator being conclusive (infra, p. 23). Such construction necessarily presupposes that the first named beneficiary has a right to question the change and also that the power to change resides in the administrator rather than in the veteran, and also that the decision is conclusive against the veteran. Petitioner contends that approval is a mere safeguard against statutory violations by the veteran and that it cannot be arbitrarily or capriciously withheld and that the primary insuring clause

could not have been inserted for the reasons assigned by the Circuit Court (p. 9, supra).

The questions thus presented are whether the first named beneficiary has any right to question a change; whether the power to change resides in the veteran or the administrator; and whether the primary insuring clause of the bond is susceptible of the construction placed upon it by the Circuit Court.

(b) Section 642 authorizing loans affects the status of every lending bank. The Circuit Court has interpreted petitioner's construction of the bond as leaving it practically without effect by absolving the Government from liability for loans made on the original after a duplicate certificate is issued. In so doing the Court has, in effect, construed this section as relegating the bank to the status of a limited assignee of a non-negotiable instrument so as to jeopardize its right to payment because of Section 643 (which does not apply to banks), and has further held that the administrator has discretion whether he shall pay the bank under Section 642 (c), which applies only before maturity (infra, p. 24).

Petitioner contends that the absolute power to lend and negotiate granted by Section 642 (b) coupled with the mandatory language of Section 642 (e) and (f) creates a direct and original obligation to make payment absolute to the bank (pp. 4, 5, supra). If that be so, the status of a bank should be the same whether a duplicate certificate has been issued or not because Section 642 as originally enacted was never modified, amended or changed despite the subsequent authorization of duplicates. Be that as it may, the risks thus excluded are few compared to all those remaining arising out of all the valid loans made before the duplicate is issued and the multiplicity of contestable claims which also fall to the attention of the surety under the bond (p. 6, supra). Moreover, these alleged excluded risks would at least create additional contestable claims.

The question then presented is whether a bank making a loan to the true veteran upon the original certificate has an absolute right to payment and whether a refusal to pay a valid claim or a disputed claim is subject to review by the courts so as to obligate the surety to bear all the expense of defending all claims whether valid or invalid and pay any sums whatever the Government is obligated to pay.

(c) The question of construing Section 649 of the Act authorizing duplicates and calling for the bond is also believed to be of great importance and far-reaching in effect. The language actually employed exacts a bond protecting against "any claim upon such lost or destroyed certificate" and requires proof of its loss or destruction with such "restrictions as to time or retention for security or otherwise" as may be prescribed. The statute seems to be devoid of any suggestion that Congress was concerned with anything more than making certain that the original was lost or stolen, so that it could not be in the hands of a lawful pledgee or subsequently fall into such hands. The protection sought was against the liability of the Government on the original to third parties.

Having construed Section 642 as absolving the Government from any legal liability to lending banks, and Section 620 as obviating the possibility of loss or expense to the surety in the defense of claims because the decisions of the administrator disallowing them are final and conclusive, thereby rendering the bond of little or no value, the Circuit Court then holds in effect that the language actually employed in the statute exacting a bond protecting against "any claim" upon the *original* certificate must mean 'any losses sustained by the Government by reason or in consequence of issuing the *duplicate*' to give the bond any value (infra, p. 25). Petitioner submits that such construction of Section 649 is premised upon a misconstruction of Sections 620 and 642 and results in expanding the engagement of the surety by reading into the statute an engagement not found in the words actually employed.

An important question is thus presented whether the bond called for by this statute is limited to claims made by third parties against the Government.

(d) Concerning the standard form of bond actually used, the Circuit Court has construed it as covering *any claim* "upon the basis of, or having as its subject-matter, the lost certificate" for the reason that petitioner's construction would limit coverage to "a *valid* claim *pursuant* to the certificate (infra, p. 25). Petitioner contends, however, that the statutory expression "any claim upon" the original certificate means, and the bond posted thereunder covers, all invalid as well as valid claims, and exposes the surety to vast liability even though it be limited solely to claims made by third parties against the Government. It is submitted that the bond itself neither exceeds nor falls short of the statutory requirements and that the engagement of a surety must be limited to and cannot be extended beyond the language actually employed.

This, of course, presents the primary question as to the proper construction of the bond itself and whether the loss in suit falls within its coverage.

(e) The decision of the Circuit Court that this bond covers losses arising out of the negligent acts of Government employees is also believed to be in conflict with the applicable decisions of this Court. The Circuit Court has evidently construed that doctrine as incorporating into every bond posted with the Government, coverage against all losses sustained through negligence merely by virtue of the fact that the bond deals generally with the subject matter, whereas petitioner contends that the loss itself must first be specifically covered by the bond before that doctrine can be invoked. If applicable, the fact that the loss covered is sustained through negligence affords no defense to the surety under a bond posted with the Government.

This presents the question whether the rule concerning negligence of Government employees is applicable to this case.

It is therefore respectfully submitted that this matter affects a statute of wide public interest involving many important questions of statutory construction and statutory bonds, as well as many basic principles of surety law, and that many special and important reasons exist for reviewing by writ of certiorari the decision of the Circuit Court.

WHEREFORE, petitioner respectfully prays that such writ issue.

Dated, New York, March 29, 1941.

CONTINENTAL CASUALTY COMPANY.

ROBERT M. MCCORMICK,
ANDREW ECKEL,
Counsel for Petitioner.